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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DANIEL MIRANDA, Defendant and Appellant.	B213117 (Los Angeles County Super. Ct. No. NA076938)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Arthur Jean, Judge. Affirmed.

Maureen L. Fox, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, John Yang, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant and appellant Daniel Miranda (defendant) guilty of two counts of attempted, premeditated murder and two counts of assault with a firearm. On appeal, defendant contends that the trial court erred by allowing the gang expert to testify as to the state of mind of various persons, including defendant, and by allowing the expert to testify that the minor with whom defendant was arrested was a self-admitted member of defendant's gang. Defendant also contends that the prosecutor engaged in prejudicial misconduct when during argument, she speculated on a shooter's reflexes. And, defendant argues that the trial court committed prejudicial error by instructing the jury with four CALCRIM instructions that, when read together, misstated the principle of reasonable doubt and the manner in which the jury should view the evidence.

We hold that defendant forfeited each of his contentions on appeal by either failing to object or request clarifying instructions at trial and that the record is insufficient to allow us to determine defendant's alternative claims of ineffective assistance of counsel. We therefore affirm the judgment of conviction.

FACTUAL BACKGROUND

According to Edward Douglas, on December 28, 2007, after 11:00 p.m., he walked from his room at a Motel 6 in Long Beach to a liquor store with Conrad Johnson, Lavert Johnson[1] and his cousin, Davon Wright. Douglas and Conrad left the liquor store before Wright and Lavert and walked back toward the Motel 6. Wright and Lavert followed at a distance of about 60 feet. When Douglas and Conrad reached the Metro PCS store, Douglas saw defendant and another Hispanic male walking toward him. Defendant and his companion were about 10 feet from Douglas and Conrad, and it

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[1] To avoid confusion, we refer to Conrad and Lavert Johnson by their first names.

seemed as if "[t]hey just came out of nowhere." As defendant approached Douglas, defendant asked him, "[D]id he bang." Douglas understood that defendant was asking him if he was in a gang and, if so, the gang in which he was a member. Douglas responded that he "didn't bang" and "just kept walking."

After Douglas and Conrad passed defendant and his companion, Douglas turned and saw defendant pull a gun from his waistband. According to Douglas, "as soon as [defendant] brung [*sic*] [the gun] out, as soon as [Douglas saw] it, [he] was gone. [He] was running." As he ran, Douglas heard gunshots and heard "bullets pass right by [him]." Defendant shot at Douglas, and, as Conrad ran across the street toward an alley, defendant shot at him. Douglas heard at least six shots. Douglas ran to save his life and hid in some bushes.

After the shooting stopped, Douglas emerged from the bushes and rejoined his cousin. Douglas, Wright, Conrad, and Lavert returned to the motel where they spoke with the police. As Douglas was speaking with the police, he saw defendant coming out of one of the motel rooms. It looked as if defendant "was trying to get everything out of the [m]otel room and leave." When defendant went back into the room, Douglas told the police that he had seen defendant there at the motel. A short time later, Douglas saw defendant trying to leave in a black vehicle, so he alerted the police. He then observed defendant drive quickly from the Motel 6.

Wright recollected that on December 28, 2007, he was staying at a Motel 6 with his cousins, Douglas, Conrad, and Lavert. At some point, the men went to a liquor store. Douglas and Conrad left the liquor store ahead of Wright and Lavert who followed them a short time later. As Wright was crossing the street at the intersection of Pacific Coast Highway and Martin Luther King Boulevard, he heard gunshots and saw a gunman shooting at Douglas and Conrad who were walking ahead of him. He watched Douglas and Conrad run as the shooter shot at both of them. Wright ran after the shooter and the shooter's companion as they ran to the Motel 6.

Wright spoke to the police at the Motel 6. As he was doing so, he saw someone in an SUV drive fast out of the driveway of the Motel 6. Wright could not and did not

identify anyone to the police as the shooter. And he did not tell the police that he heard the shooter ask Douglas "Where you from?"

City of Long Beach Police Officer Thomas Erdelji testified he responded to the vicinity of 1075 Pacific Coast Highway in Long Beach following a report of shots fired. When he arrived at the location, he noticed that other officers had already responded to the scene, so he made a u-turn in front of the motel. As he was coming to a stop, he saw a black SUV exit the parking lot. The driver's face appeared "frantic and rushed." Officer Erdelji identified defendant as the driver of the vehicle. The SUV came to a stop in the driveway at the motel and then proceeded "rather fast" westbound on Pacific Coast Highway.

Officer Erdelji and other officers made a traffic stop of the vehicle a block from the motel. In addition to defendant, there was a male Hispanic minor in the vehicle. After defendant was taken from the vehicle and secured, Officer Erdelji searched the vehicle. He found a semiautomatic handgun behind the glove box. He photographed the gun at the location, made it safe by removing the magazine and pulling back the slide, and placed the gun in evidence. When Officer Erdelji recovered the handgun, the magazine and the chamber were both empty.

City of Long Beach Police Officer Adam Ferris said he and his partner were the first officers to respond to the Motel 6 on December 28, 2007, after they received the report of shots fired. They detained someone who was standing on the north side of Pacific Coast Highway trying to flag them down. The man was an African-American who told the officers that someone had shot at him. The man pointed the officers in the direction of the Motel 6, about 30 yards from where he was standing. The man's friend or cousin had followed the suspects that had shot at him to the motel and knew in which room the suspects were located.

Officer Ferris interviewed Wright after the suspect vehicle had been stopped. Wright told Officer Ferris that defendant approached Douglas and Conrad and said, "Where are you from?" Wright confirmed for Officer Ferris that he could identify the shooter, and another officer took Wright to a field show-up.

On December 28, 2007, Officer Ricardo Solorio said he responded to the scene of the shooting. He assisted in the traffic stop of the suspect vehicle. He interviewed defendant after reading him his *Miranda*[2] right. Defendant agreed to speak to Officer Solorio and told the officer that he was a member of the Barrio Pobre gang and that his moniker was Smiley.

Officer Solorio conducted a field show-up for Wright. He showed Wright defendant and three other individuals. When Wright saw defendant in the field show-up, he immediately said, "That is the guy that was shooting."

City of Long Beach Police Department Criminalist Troy Ward testified he was asked to examine six cartridge cases recovered from the scene[3] and then to test fire the handgun recovered from the suspect vehicle to determine if the cartridge cases had been fired from that handgun. He determined that the six cases recovered from the scene had been fired by the handgun recovered from the suspect vehicle.

City of Long Beach Police Detective Hector Gutierrez recounted he had been a gang detective for 16 or 17 years at the time of trial. He testified regarding gangs at trials and preliminary hearings "almost every day." He was familiar with the Barrio Pobre gang and had investigated that gang for nearly 18 years. The Barrio Pobre gang was comprised of mostly Hispanic males and had between 228 and 232 members. The gang had a hand sign and it used the letter P as one of its symbols. The area where the shooting occurred was not claimed by the Barrio Pobre gang, but many current members of that gang originally came from that area.

Detective Gutierrez explained that when a gang member asks someone where he was from, the gang member is trying "to find out what gang [that person is] from,

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

[3] City of Long Beach Police Officer Jeremy Remo recovered six shell casings from the scene of the shooting.

whether [that person is] an enemy or a friend. If [the person questioned] say[s] the wrong thing, it could lead to violence, death or some physical altercation."

Detective Gutierrez opined that the gangs with which he was familiar were racially divided between African-American gangs and Hispanic gangs. The Barrio Pobre gang is comprised of only Hispanic members. The African-American victims in this case could have been attacked "just because of who they [were] and where they [were]."

According to Detective Gutierrez, defendant's admission to the police that he was a member of the Barrio Pobre gang was a common occurrence. "[Gang members] want people to know where they are from, what their mindset is. It is . . . a bravado type thing." Detective Gutierrez confirmed that pride and respect are important to gang members. As he explained, "the respect that [a gang member has] within the gang is everything. If [the gang member does not] have respect within the gang, [he will] be looked at as a nonworthy gang member or a sissy or a little baby, somebody who is not worthy enough to be in the gang. A gang member earns respect within a gang "[b]y committing crimes, earning money for the gang, committing violent acts." The Barrio Pobre gang earned money by committing robberies and selling narcotics. The gang also engaged in murder, auto theft, identity theft, and witness intimidation.

In addition to admitting to police on the night of the shooting that he was a Barrio Pobre gang member, defendant had previously admitted to Detective Gutierrez that he was a member of that gang. Detective Gutierrez had previously contacted defendant in the presence of other gang members. He had also contacted defendant in the presence of Barrio Pobre gang graffiti. In addition, defendant had Barrio Pobre gang tattoos.

Based on his research, Detective Gutierrez opined that defendant was a Barrio Pobre gang member. Detective Gutierrez also investigated the minor who was arrested with defendant on the night of the shooting and determined that the minor was an admitted Barrio Pobre gang member. From the facts of the shooting, including that defendant asked Douglas where he was from, Detective Gutierrez concluded that the shooting was committed for the benefit of the Barrio Pobre gang. According to Detective Gutierrez, "members of the Barrio Pobre street gang very often engage in violent crimes.

The more violent crimes [a gang member] commits, the more [his] reputation is enhanced. So if the gang member's reputation [is] enhanced within the gang, he's looked at as a worthy gang member. [¶] Also word gets out on the street and the reputation of the Barrio Pobre gang is enhanced because rival gang members will hear that this violent crime was committed by a member of [the] Barrio Pobre [gang] and that all benefits the gang." The crime also protected the narcotics sales activity of the Barrio Pobre gang.

PROCEDURAL BACKGROUND

In an information, the Los Angeles County District Attorney charged defendant in count 1 with the attempted, willful, deliberate, premeditated murder of Conrad in violation of Penal Code sections 664 and 187, subdivision (a)[4]—a felony; in count 2 with the attempted, willful, deliberate, premeditated murder of Douglas in violation of sections 664 and 187, subdivision (a)—a felony; in count 3 with assault with a firearm on Conrad in violation of section 245, subdivision (a)(2)—a felony; and in count 4 with assault with a firearm on Douglas in violation section 245, subdivision (a)(2)—a felony.

The district attorney alleged as to counts 1 and 2 that the attempted murders were committed willfully, deliberately, and with premeditation within the meaning of section 664, subdivision (a) and were serious felonies pursuant to section 1192.7, subdivision (c). The district attorney further alleged as to counts 1 and 2 that defendant personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c), causing the offenses to become serious felonies pursuant to section 1192.7, subdivision (c)(8) and violent felonies within the meaning of section 667.5, subdivision (c)(8); and that defendant personally used a firearm within the meaning of section 12022.53, subdivision (b), causing the offenses to become serious felonies pursuant to section 1192.7, subdivision (c)(8) and violent felonies within the meaning of section 667.5, subdivision (c)(8). As to count 3, the district attorney alleged that defendant

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[4] All further statutory references are to the Penal Code unless otherwise indicated.

personally used a firearm within the meaning of sections 12022.5, 1192.7, subdivision (c) and section 667.5, subdivision (c). As to all counts, the district attorney alleged pursuant to section 186.22, subdivision (b)(1)(C) that defendant committed those offenses for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members, causing such offenses to become serious felonies within the meaning of section 1192.7, subdivision (c)(8). The district attorney also alleged as to all counts that defendant personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (c) and (e)(1) and that a principal personally used a firearm within the meaning of section 12022.53, subdivisions (b) and (e)(1). And, as to counts 3 and 4, the district attorney alleged that defendant personally used a firearm within the meaning of section 12022.5, subdivision (a) causing those offenses to become serious felonies within the meaning of section 1192.7, subdivisions (c)(8) and violent felonies within the meaning of section 667.5, subdivision (c)(8).

Defendant pleaded not guilty. Following trial, the jury found defendant guilty as charged. As to counts 1 and 2, the jury found true the allegations that the attempted murders were committed willfully, deliberately, and with premeditation and that defendant personally and intentionally discharged a handgun within the meaning of section 12022.53, subdivision (c). As to counts 3 and 4, the jury found true the allegations that defendant personally used a handgun within the meaning of section 12022.5, subdivision (a). As to all counts, the jury found true the allegation that defendant committed those crimes for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members within the meaning of section 186.22, subdivision (b)(1)(C).

The trial court sentenced defendant on count 1 to a term of life in prison, plus 20 years pursuant to section 12022.53, subdivision (c) and stayed the 10-year sentence under section 186.22, subdivision (b)(1)(C); on count 2 to a concurrent life sentence, plus 20 years pursuant to section 12022.53, subdivision (c) and stayed the 10-year sentence under

section 186.22, subdivision (b)(1)(C); on count 3 to a term of 24 years comprised of an upper term four-year sentence, plus a 10-year sentence under section 12022.5 and an additional 10-year sentence under section 186.22, subdivision (b)(1)(C), which sentence was stayed; and on count 4 to a term of 24 years comprised of an upper term four-year sentence, plus a 10-year sentence under section 12022.5 and an additional 10-year sentence under section 186.22, subdivision (b)(1)(C), which sentence was stayed.

DISCUSSION

A. Admission of Gang Expert's State of Mind Testimony

Defendant contends that Detective Gutierrez, the gang expert, improperly testified as to the state of mind of various persons, including defendant. Defendant challenges Detective Gutierrez's testimony that witnesses either did not appear because they were intimidated or gave testimony that differed from statements they gave to police because they were intimidated. Defendant also attacks the expert's testimony about the defendant's motive for the way he handled the gun. According to defendant, that testimony exceeded the limits of permissible gang expert testimony, lowered the prosecution's burden of proof, and prejudiced defendant. The Attorney General argues that defendant forfeited those contentions on appeal by not objecting at trial to the challenged testimony. We agree.

"Ordinarily, an appellate court will not consider a claim of error if an objection could have been, but was not, made in the lower court. (*People v. Saunders* (1993) 5 Cal.4th 580, 589–590 [20 Cal.Rptr.2d 638, 853 P.2d 1093] (*Saunders*).) The reason for this rule is that '[i]t is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided.' (*People v. Vera* (1997) 15 Cal.4th 269, 276 [62 Cal.Rptr.2d 754, 934 P.2d 1279] (*Vera*); see *Saunders*, *supra*, 5 Cal.4th at p. 590.) '[T]he forfeiture rule ensures that the opposing party is given an opportunity to address the objection, and it prevents a party from engaging in gamesmanship by choosing not to object, awaiting the outcome,

and then claiming error.' (*People v. Kennedy* (2005) 36 Cal.4th 595, 612 [31 Cal.Rptr.3d 160, 115 P.3d 472].)" (*People v. French* (2008) 43 Cal.4th 36, 46.)

The forfeiture rule applies to the admission of expert testimony. (*People v. Doolin* (2009) 45 Cal.4th 390, 448.) As the court in *People v. Williams* (2008) 43 Cal.4th 584, 624, explained, "This case constitutes a classic illustration of the basis for rules requiring that objections to the introduction of evidence . . . must be made in the first instance in the trial court. These objections . . . must be initiated in the trial court so that the court can take steps to prevent error from infecting the remainder of the trial, [and] so that an adequate record may be developed . . . . Equally important as a basis for forfeiture rules is the need to afford the prosecution the opportunity to rebut the defendant's claims . . . , provide additional foundation for the admission of evidence, or cure the error."

It is undisputed that defendant failed to object in the trial court to the admission of the gang expert's testimony about which he now complains. Because of that failure, the trial court was deprived of the opportunity to consider the issue and avoid or correct the alleged error. Moreover, the prosecution was denied the opportunity to address the objections or lay further foundation. Based on his failure to object at trial, defendant has forfeited his contentions concerning the gang expert's state-of-mind testimony.

Defendant argues that his failure to object should be excused because the required objections would have been futile. (See *People v. Wilson* (2008) 44 Cal.4th 758, 793 ["A litigant need not object . . . if doing so would be futile"].) But defendant does not explain why objections would have been futile, stating merely that it was "too late for an admonition to unring the bell." Moreover, there is nothing in the record that supports such a contention. Absent some indication from the trial court that it was not inclined to entertain objections such as those required in this case, we cannot conclude that objections would have been futile or excuse defendant from his failure to make such objections.

Defendant's alternative argument that his trial counsel's failure to object to the gang expert's state-of-mind testimony constituted ineffective assistance of counsel is unavailing. It is not apparent from the record why defendant's trial counsel did not object

to the challenged testimony. Under such circumstances, we cannot determine the claim of ineffective assistance of counsel, which claim is more appropriately raised by a petition for a writ of habeas corpus. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266 ["We have repeatedly stressed 'that "[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected'"]; *People v. Tafoya* (2007) 42 Cal.4th 147, 196, fn. 12 ["a claim of ineffective assistance of counsel is more appropriately raised in a petition for writ of habeas corpus [citation], where 'relevant facts and circumstances not reflected in the record on appeal, such as counsel's reasons for pursuing or not pursuing a particular trial strategy, can be brought to light to inform the two-pronged inquiry of whether counsel's "representation fell below an objective standard of reasonableness," and whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."'"].)

B. Admission of Testimony that Minor Arrested with Defendant Was a Gang Member

Defendant also challenges the admission of Detective Gutierrez's testimony that the minor arrested with defendant was an admitted member of the Barrio Probre gang. According to defendant, that testimony was not an opinion, but rather a repetition of the minor's out of court statement to police that he was a gang member. Because the minor did not testify and was not subject to cross-examination, defendant argues that the admission of this testimony violated his federal Constitutional rights under the Sixth Amendment's confrontation clause. The Attorney General counters that defendant forfeited his confrontation clause objection by failing to raise it in the trial court.

It is well established that objections to the admission of evidence on federal Constitutional grounds, including the confrontation clause, are subject to the forfeiture rule. (See *People v. Catlin* (2001) 26 Cal.4th 81, 138, fn. 14; *People v. Burgener* (2003)

29 Cal.4th 833, 869; *People v. Dennis* (1998) 17 Cal.4th 468, 529; and *People v. Alvarez* (1996) 14 Cal.4th 155, 186.) Based on those authorities, we hold that defendant forfeited his claim of error based on the confrontation clause.

Defendant contends that he should be excused from his failure to object because any objection to the challenged evidence would have been futile. Other than concluding that an objection would have been futile, however, defendant does not provide a basis for that conclusion. And the record does not support that assertion of a futility excuse. We therefore reject defendant's claim of futility.

For the reasons discussed above, we also reject defendant's claim of ineffective assistance of counsel. The record sheds no light on the reason defendant's counsel did not object, such that we have no basis upon which to determine the ineffective assistance claim.

C. Asserted Prosecutorial Misconduct

Defendant contends that the prosecutor engaged in prejudicial misconduct during argument when she stated that a shooter's reflexes would not be quick enough to target accurately a victim who was running away. According to defendant, that argument amounted to unsworn expert testimony based on evidence that was not presented to the jury. The Attorney General again responds that the misconduct claim has been forfeited due to defendant's failure to object to the challenged comments at the time they were made and to request a curative admonition.

"To preserve a claim of prosecutorial misconduct, a defendant must make a timely and specific objection. Failure to do so forfeits the issue for appeal. (*People v. Gray* (2005) 37 Cal.4th 168, 215 [33 Cal.Rptr.3d 451, 118 P.3d 496].) 'Because we do not expect the trial court to recognize and correct all possible or arguable misconduct on its own motion [citations], defendant bears the responsibility to seek an admonition if he believes the prosecutor has overstepped the bounds of proper comment, argument, or inquiry.' (*People v. Visciotti* (1992) 2 Cal.4th 1, 79 [5 Cal.Rptr.2d 495, 825 P.2d 388].)" (*People v. Wilson, supra,* 44 Cal.4th at p. 800.)

Defendant's trial counsel did not make a specific and timely objection to the challenged comments by the prosecutor and did not request the trial court to admonish the jury immediately after the comments were made. He therefore forfeited his misconduct claim.

In addition, defendant's futility claim is unsupported by any reference to the record or substantive argument. Thus, we cannot excuse his failure to object based on futility.

And defendant's ineffective assistance of counsel claim suffers from the same deficiency as his other similar claims. The record does not reflect why his trial counsel failed to object to the challenged comments by the prosecutor or why counsel failed to request a curative admonition. We therefore reject defendant's ineffective assistance of counsel claim.

D. Jury Instructions

Defendant claims that the trial court erred when it instructed the jury with CALCRIM Nos. 220, 222, 223, and 226. According to defendant, those instructions, when read together, suggested to the jury that it must weigh each side's evidence and that the defense had the burden of disproving the prosecution's evidence. Defendant argues that the cumulative effect of those instructions was to undermine the principle of reasonable doubt.

Contrary to defendant's assertion, each of the challenged instructions, when read in isolation, is a correct statement of the law. Thus, even assuming, arguendo, that the instructions, when read together, may have misinformed the jury as defendant contends—a contention that is contrary to the decisions in *People v. Hernández Rios* (2007) 151 Cal.App.4th 1154, *People v. Flores* (2007) 153 Cal.App. 4th 1088, *People v. Westbrooks* (2007) 151 Cal.App. 4th 1500, *People v. Ibarra* (2007) 156 Cal.App. 4th 1174, 1191—it was incumbent upon him to request clarifying instructions that addressed any potential misimpression the instructions taken together may have imparted to the jury. As the court in *People v. Guerra* (2006) 37 Cal.4th 1067, 1134 explained, although an appellate

court may review an unobjected-to instruction that allegedly implicates a defendant's substantial rights, a claim that an instruction, correct in law, should have been modified "is not cognizable . . . because defendant was obligated to request clarification and failed to do so." Defendant's failure to request clarifying instructions from the trial court precludes us from considering his claim of instructional error on appeal.

DISPOSITION

The judgment of conviction is affirmed.

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MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.